BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
Access Charge Reform	)	**CC Docket No. 96-262**
	)	

MCI'S OPPOSITION TO THE NYNEX PETITION FOR A PARTIAL STAY

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EXECUTIVE SUMMARY

NYNEX presents no legitimate basis for staying implementation of the rule prohibiting assessment of interconnection charges on traffic carried over competitive access providers' ("CAP"s) local transport, codified at 47 C.F.R. § 69.155(c), or a temporary order modifying that rule. Interconnection charges were adopted as an interim measure to provide a transition period to incumbent local exchange carriers. Five years later, the Commission has adopted another transition plan with respect to interconnection charges that will further ease incumbent local exchange carriers' entry into the competitive marketplace by providing years of revenues far higher than can be justified by the true economic cost of providing interconnection services.

NYNEX's procedural challenge is frivolous. The Commission's notice stated expressly that the Commission was concerned that imposing interconnection charges on traffic carried by CAPs was anticompetitive. If, in the current procompetitive era, that notice was insufficient to alert NYNEX that the Commission could adopt a rule prohibiting

interconnection charges on traffic carried by CAPs if not persuaded otherwise, the fault is scarcely the Commission's.

Similarly, NYNEX's assertion that the Commission's adoption of the rule was arbitrary and capricious because it is unexplained or contradicts other determinations in the same order is meritless. The Commission explained clearly why the prior approach impeded its goal of transforming telecommunications into a fully competitive industry, and why the rule adopted was the appropriate solution. Moreover, permitting vigorous competition for local transport services -- the purpose of the rule -- is wholly consistent with the Commission's other determinations, the order as a whole, and the Congressional policy the Commission is required to implement.

NYNEX's objection is essentially an objection to the goal of a competitive marketplace. NYNEX would prefer to retain the interim plan's guaranteed revenues rather than trim unnecessary costs and compete with efficiency and innovation on a level playing field. That Congress and this Commission have determined that competition would best serve the public makes clear that the public interest weighs decisively in favor of denying NYNEX's petition.

NYNEX will suffer no irreparable harm if the Commission does so. NYNEX, as it admits, has complete discretion with respect to matching competitors' rates and therefore can protect itself fully from loss of customers on that basis. No other harm asserted by NYNEX can even be

characterized as irreparable. Deprivation of a sufficient explanation by the agency is generally remediable by further explanation, and thus entirely reparable. Loss of revenues is an economic injury reparable by a retroactive rate increase in the unlikely event that appellate action makes such a remedy necessary, as NYNEX admits. NYNEX Br. at 23.

Because granting the stay requested would harm the public and NYNEX's local transport competitors, and because NYNEX has made no showing that denying the stay would subject it to irreparable harm, the petition for a stay should be denied. For at least the same reasons, the alternative extraordinary remedy NYNEX requests -- temporary modification of the rule to permit incumbent local exchange carriers to impose the portion of the per-minute residual TIC that is not service-related to traffic carried on their competitors' local transport -- should also be denied.

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OPPOSITION OF MCI TO THE NYNEX PETITION FOR A PARTIAL STAY

MCI Telecommunications Corporation ("MCI") opposes NYNEX's request for a stay of 47 C.F.R. § 69.155(c), or a temporary order modifying § 69.155(c). The challenged rule was adopted in the Commission's First Report and Order in CC Docket No. 96-262, FCC 97-158 (rel. May 16, 1997) ("Access Charge Reform"), Appendix C, as part of the Commission's initial efforts to replace interconnection charges with a cost-based, pro-competitive rate structure.

Interconnection charges were adopted five years ago as an interim measure intended to ease a transition for incumbent local exchange carriers ("LEC"s) by temporarily guaranteeing their revenues. This was a make-whole arrangement for the benefit of incumbent LECs without any attempt to determine whether the revenues were appropriately justified by economic cost.

Reform was required by long-standing Commission policy and mandated in part by Comptel Ass'n v. FCC, 87 F.3d 522 (D.C. Cir. 1996). The Commission responded with a transition plan that can be expected to require several years of regulation, and even more years of competition, to eliminate interconnection charges, or reduce them to their

true economic cost, if any. Although convincing arguments can be made that the Commission's initial efforts did not go far enough, no credible argument has, or can, be made that they go too far.

NYNEX is certainly not entitled to the extraordinary remedy of a stay here where each of the determining factors weighs against it. Not only is NYNEX unlikely to prevail on the merits, it will suffer no irreparable harm if the stay is not granted; other interested parties will be harmed if a stay is granted; and a stay would not serve the public interest.[1/]

Significantly, NYNEX does not allege that the Commission could not have lawfully reduced or eliminated the interconnection charges that incumbent LECs are permitted to impose. Indeed, NYNEX itself proposed a plan to the Commission which included elimination of up to 80 percent of interconnection charges. See Access Reform Order ¶ 216. Instead, NYNEX relies on the implausible claim that the Commission's notice of proposed rulemaking -- which specifically questioned the anti-competitive impact of imposing interconnection charges on traffic carried over competitors' local transport -- was inadequate notice for a rule prohibiting interconnection charges on traffic carried over competitors' local transport.

[1/] See Wisconsin Gas Co. v. FERC, 758 F.2d 669, 673-74 (D.C. Cir. 1985); WMATA v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

NYNEX's remaining allegations challenge the adequacy of the Commission's explanation, not the legality of restricting interconnection charges. Thus, even if NYNEX could prevail on its challenge to the Commission's reasoning, NYNEX would be entitled only to a remand for further explanation. The restriction on interconnection charges would be left in place. See ICORE, Inc. v. FCC, 985, F.2d 1075, 1081 (D.C. Cir. 1993); Comptel, 87 F.3d at 536. Because NYNEX would not be entitled to an injunction against enforcement of the rule even if its appeal succeeds, there is no basis for the extraordinary remedy of a stay in advance of that hearing.

I. PETITIONER IS UNLIKELY TO PREVAIL ON THE MERITS.

Both NYNEX challenges are meritless and have no prospect of success on the merits.

A. The Commission Provided Full Notice and Opportunity To Be Heard on Interconnection Charge Reform.

NYNEX's assertion that the challenged rule does not comport with the Administrative Procedure Act's requirements for adequate notice and comment, 5 U.S.C. § 553(b), is frivolous. This Commission issued a Notice of Proposed Rule-Making more than three months before adopting the challenged rule.[2/] That notice explained that the rulemaking was

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[2/] See Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, CC Docket Nos. 96-262, 94-1, 91-213, 96-263, FCC 96-488 (rel. Dec. 24, 1996), 62 Fed. Reg. 4670 (Jan. 31, 1997) ("NPRM").

intended to restructure the entire access charge system "to make it compatible with the competitive paradigm established by the 1996 Act . . . to open local networks to competition." NPRM at 4671. In that notice, the Commission also alerted all interested parties to its intention "to establish a mechanism to phase out the TIC in a manner that fosters competition and responds to the court's remand" in Comptel. NPRM at ¶ 97. One option for accomplishing this, mentioned in the notice, was adoption of regulations that would eliminate interconnection charges altogether. Id. at ¶ 117.

Finally, that notice alerted parties that the Commission was specifically concerned that the current practice permitting incumbent LECs to assess interconnection charges on all traffic placed competitive local transport providers ("CAPs") at a disadvantage to the extent it required them to subsidize the transport services provided by the incumbent LECs.[3/] Following that notice, NYNEX not only had the opportunity to submit comments, NYNEX did submit comments. See Access Reform Order ¶¶ 216, 232 (referring to two of NYNEX's many submissions).

[3/] Id. at ¶ 96 ("The TIC is a per-minute charge assessed on all switched access minutes, including those of competitors that interconnect with the LEC switched access network through expanded interconnection. . . . In addition, to the extent that any portion of the TIC should properly be included in LEC transport rates, other than the TIC, the TIC provides the LECs with a competitive advantage for their interstate transport services because incumbent LEC transport rates are priced below cost while the LECs' competitors using expanded interconnection must pay a share of incumbent LEC transport costs through the TIC.").

Thus, NYNEX was placed on notice that the Commission was considering methods to phase out interconnection charges altogether. It was also placed on specific notice that the Commission was concerned about the anti-competitive effect of permitting NYNEX, among others, to assess interconnection charges on traffic using a competitor's local transport. Indeed, NYNEX admits that the notice "raised the subject of application of the TIC to CAP transport." NYNEX Br. at 18. That NYNEX apparently chose not to comment on the effect of prohibiting application of the TIC to traffic using CAP transport may have reflected NYNEX's strategy; it certainly did not reflect any failure to receive notice.

NYNEX's further complaint that it did not have a chance to comment on a proposal from other interested parties with respect to this issue misconstrues the notice and comment requirement. That requirement provides interested parties an opportunity to present their views and knowledge to an agency considering a rulemaking. It does not guarantee each party an opportunity to comment on every other party's comments. If it did, no rule could ever be adopted, because each round of comments would require a further round of comments, and so on ad infinitum.[4/]

[4/] NYNEX's complaint also strains credulity. NYNEX was a regular and active participant in ex parte meetings at the Commission throughout the Commission's deliberations.

B. The Commission's Restriction on Assessing Interconnection Charges On CAP Traffic Is Adequately Explained.

NYNEX has not, and cannot, assert any legitimate claim that the Commission's adoption of the rule preventing incumbent LECs from imposing interconnection charges on traffic carried by CAP transport was arbitrary or capricious. To the contrary, the Commission's adoption of the rule was accompanied by a clear explanation of its reasons for doing so. The Commission pointed to the significant risk that interconnection charges imposed by an incumbent LEC include some of the incumbent LEC's own transport costs, and explained that imposing such charges on traffic using a competitor's transport results in the competitor paying some of the incumbent LEC's transport costs. The Commission further explained that requiring local transport competitors to subsidize incumbent LEC local transport facilities "is inconsistent with the procompetitive goals of the 1996 Act." Access Reform Order ¶ 240.

NYNEX does not challenge the Commission's reasoning or the Commission's conclusion that there are incumbent LEC transport costs included in interconnection charges. NYNEX's argument instead is that the Commission is obligated to prove that every dollar of interconnection charges subject to the restriction poses a direct threat to local transport competition. In other words, the Commission, having decided not to disallow all interconnection charges immediately,

cannot impose any limitations unless they meet a standard even more rigorous than the least restrictive means test.

NYNEX misreads the both the law and the Commission's decision. The Commission's obligation is to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (emphasis added). The Commission satisfied both requirements in adopting the challenged rule. It clearly examined the data available, see, e.g., Access Reform Order ¶¶ 232-235, and NYNEX does not claim otherwise. The Commission's inability to identify all the costs reflected in the interconnection charges, id. at ¶¶ 231, 242, was caused by NYNEX and its fellow incumbent LECs, who claim to incur these costs but have failed to provide the Commission with proof that these costs exist or can, in any way, be justified. NYNEX, for example, submitted its conclusion that these costs were non-traffic sensitive, "without explanation." Id. at ¶ 232 (emphasis added). Interestingly, NYNEX does not attempt even in its petition to provide any information about these "costs" other than its resolve to impose them on others.

The Commission's explanation for its rule also easily meets the applicable standard. Indeed, NYNEX does not challenge the conclusions that some transport costs are included in interconnection charges and that this distorts

competition. Further, as the Commission noted, another regulatory agency has also chosen recently to impose the same rule for the same reasons. Id. at ¶ 240 & n.302.

Contrary to NYNEX's assertions, the Commission's adoption of this rule does not contradict its other interconnection charge determinations. The Commission determined that interconnection charges should be reallocated to appropriate elements where possible, and eliminated as quickly as possible by improvements in productivity encouraged by both price cap reductions and competition. Id. at ¶¶ 213, 230, 234-238. Whether or not those determinations are justifiable, the Commission's decision to preclude imposition of interconnection charges where such charges would impair that competition is wholly consistent, and fully explained. Id. at ¶ 243.

The stay NYNEX seeks, on the other hand, would undermine the Commission's and Congress's policies both because it would impede competition for providing local transport and because it would provide "TIC revenues special insulation against the pressures of the competitive marketplace." Id. at ¶ 231. NYNEX's supposition that what the Commission did not prohibit, it undertook to ensure, is mistaken on two grounds. First, the Commission did prohibit imposition of interconnection charges on traffic carried by CAPs. Second, the Commission has not undertaken to ensure any interconnection charge revenues. It has merely chosen to permit incumbent LECs to impose such charges subject to price

caps, PICCs caps, competition, and the challenged rule. The Commission does not guarantee that any particular incumbent LEC will be able to collect all the interconnect charge revenues permitted any more than it guarantees that incumbent LECs will be able to collect access charges at the highest rate permitted under the price cap rules. To the contrary, this type of rate regulation is premised on the expectation that competition will develop sufficiently to prevent incumbent LECs from being able to impose its expenses, however profligate, on the public. See id. at 243.[5/]

Ultimately, NYNEX's concern appears to be that it will lose these revenues sooner than other incumbent LECs. Such sibling rivalry is both legally irrelevant and premised in large part on a misinterpretation of the Commission's decision. First, the Commission is under no obligation to ensure that each carrier will be affected identically by identical rules. And no rule proposed by NYNEX would yield such a result. These rules necessarily affect incumbent LECs differently, and even the same incumbent LEC differently over time, because that effect hinges on the amount of inefficient costs the incumbent LEC attempts to recover and the degree of competition to which it is subject. If competition will prevent NYNEX from recovering inefficient costs, this is not an unexpected harm, it is precisely the goal the Commission adopted, and explained, for all incumbent LECs.

[5/] Indeed, NYNEX itself proposed to the Commission that it should rely on marketplace discipline to eliminate interconnection charges. See NPRM at ¶ 113.

Second, NYNEX has derived a major part of its complaint from a misreading of the Commission's order. Under NYNEX's reading, the Commission would permit all incumbent LECs to recover any interconnection charges that had not already been reallocated through PICCs. Based on this reading, NYNEX complains that other incumbent LECs will impose all their interconnection charges through this means, whereas NYNEX will have interconnection charges left over after reaching the applicable PICCs caps. NYNEX Br. at 13.

The Commission's decision, however, does not permit any incumbent LEC to recover interconnection charges derived from facilities-based costs through PICCs. See Access Reform Order ¶¶ 210-228. The only interconnection charges that may be recovered through PICCs under the Commission's plan are the unidentified residual costs included in interconnection charges. Id. at ¶ 239. Those charges do not include any of the costs identified as facilities-based costs that are not yet reallocated. See id. at ¶ 235. Thus, NYNEX's comparison of the rule's effect on itself and on other incumbent LECs is, even as a factual matter, patently wrong.

Because NYNEX presents no legitimate complaint to the Commission's adoption of 47 C.F.R. § 69.155(c), it has no likelihood of success on the merits.

II. THE EQUITIES TIP DECISIVELY AGAINST GRANTING A STAY.

In arguing to preserve the status quo, NYNEX disregards the fact that the scheme it attempts to preserve

was adopted as an interim measure, and that the "interim period has long since expired." Comptel, 87 F.3d at 532. NYNEX's bid to hold onto the scheme yet longer is contrary to its interim nature, the D.C. Circuit's ruling in Comptel, and the pro-competitive policies Congress has determined are appropriate for the telecommunications industry. The injuries NYNEX alleges instead focus entirely on the failure of the challenged rule to insulate them from the risks imposed by competition -- the same risks that benefit the public by obliging service providers to increase their efficiency, responsiveness and range of products.

A. A Stay Is Not in the Public Interest.

The Commission adopted the challenged rule in order to remove a barrier to competition in the local transport industry by requiring competitors to subsidize the transport services provided by incumbents. See 62 Fed. Reg. ¶ 96; Access Reform Order ¶ 243. A stay would harm the public by impeding that competition.

A stay would require CAPs and their customers to pay interconnection charges to their incumbent LEC local transport competitors. Because those interconnection charges include some of the incumbent LEC's costs of providing transport, CAPs and their customers are therefore required to pay not only the CAP's and its customers' transport costs but also to underwrite some of the incumbent LEC's transport costs. This is especially likely where incumbent LECs face

significant competition from CAPS, such as NYNEX, and therefore keep their direct charges for transport low.[6/]

Extracting such a subsidy from CAPs in order to provide it to their incumbent LEC competitors places CAPs at a serious competitive disadvantage and distorts the market choices available to local transport customers. See Access Reform Order ¶ 231. It also artificially raises the cost of long distance calling, imposing unnecessarily high prices on the public and suppresses demand for the long distance network. Id. at ¶ 212.

NYNEX admits that denying the requested stay would encourage competition. Indeed, NYNEX expressly argues that the Commission's rule, if not stayed, will result in "CAPs [seeking] to establish additional collocation nodes in more and more NYNEX central offices" where they do not now provide a competitive alternative to NYNEX. NYNEX Br. at 20-21.

NYNEX's argument for the equities of a stay despite its undisputed inhibiting effect on competition underscores NYNEX's failure to accept the goal of a competitive marketplace. In NYNEX's monopolist view, it is enough that "CAPs have been able to gain significant share of the High Capacity market in the NYNEX region." NYNEX Br. at iii. To NYNEX, there is apparently no value to providing CAPs the opportunity to gain access to a larger share of the High

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[6/] See Access Reform Order ¶ 240 ("if the incumbent LEC's transport rates are kept artificially low and the difference is recovered through the TIC, competitors of the incumbent LEC pay some of the incumbent LEC's transport costs").

Capacity market or to shares of other markets in the NYNEX region - and NYNEX therefore looks to a stay to help freeze competition in its current state. This is not, however, in the public interest which, as Congress and this Commission have determined, requires the opportunities and discipline of a fully competitive market.

B. Petitioner Will Suffer No Irreparable Harm if the Petition is Denied.

NYNEX will suffer no irreparable harm by being denied, for some interim period, adequate explanations of the Commission's decision. If the court of appeals remands on this basis, the Commission may well fully cure the problem by explaining in more detail how its conclusions were reached. Any harm NYNEX suffered by being deprived of this information will then be remedied.

Second, NYNEX will suffer no irreparable harm from losing customers unless they so choose. NYNEX's sole argument with respect to customers is that if NYNEX sets local transport prices to cover interconnection charges, they will be underbid by CAPs who are not required to pay such charges. Nonetheless, NYNEX also admits that it retains control over its own prices and can choose to set prices that are not inflated by interconnection charges. NYNEX Br. at 20. Thus, whether NYNEX suffers any harm at all from losing customers by being underpriced by CAPs is entirely within NYNEX's control.

At most, the harm NYNEX faces is loss of revenues, an economic injury that falls far short of the standard for irreparable harm. See, e.g., Iowa Util. Bd. v. FCC, 109 F.3d 418, 426 (8th Cir. 1996). In the unlikely event that NYNEX would prevail on its challenge, and the Commission was not able to cure any difficulties with further explanation, NYNEX does not dispute the Commission's ability to cure lost revenues with retroactive rate adjustments. NYNEX Br. at 23 & 23 n.45 (suggesting only that a retroactive rate increase of this scale would be poor policy). See also Public Utils. Comm'n of California v. FERC, 988 F.2d 154 (D.C. Cir. 1993) (agency may order retroactive rate adjustments when earlier order reversed on appeal); Natural Gas Clearing House v. FERC, 965 F.2d 1066 (D.C. Cir. 1992) (same). It is well settled that any actionable harm to petitioners recoverable through retroactive rate adjustments is not irreparable. See, e.g., Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985).

CONCLUSION

NYNEX's request for a stay should be denied. For at least the same reasons, the alternative extraordinary remedy NYNEX requests -- temporary modification of the rule to permit incumbent local exchange carriers to impose the portion of the per-minute residual TIC that is not service-related to traffic carried on their competitors' local transport -- should also be denied.

Respectfully submitted,

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ATTORNEYS FOR
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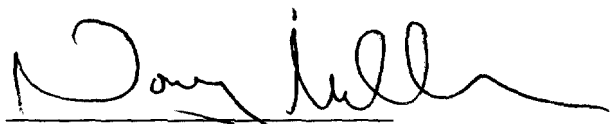
August 8, 1997

CERTIFICATE OF SERVICE

I, Nory Miller, hereby certify that I have this 8th day of August, 1997, caused a true copy of the foregoing to be served on the parties listed on the attached service list by U.S. mail, first-class, postage prepaid, except where noted by Hand Delivery.



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Dated: August 8, 1997

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